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Revenue Competitions between Sovereigns: State and Tribal Taxation in Montana

Heather Cahoon

Tribal self-sufficiency and self-government depend in part upon a tribe's ability to raise revenue and regulate its territory, and the power to tax plays an essential role in this.[1] Tribal constitutions, in fact, contain tax authorities as part of the tribal council's power. Each tribal government has—and had to have—taxing authority in order to conduct the important business of the tribal nation. Taxation authority in Indian country, however, has been one of the most litigated issues between tribes, states, and local governments. This is largely because current federal Indian tax policy is incomplete, leaving room for uncertainties that ignite legal disputes between governments with overlapping jurisdictions and competing interests in terms of their revenue-generating needs. In response, a coalition of tribes, intertribal organizations, and federal officials has long been advocating for the clear articulation of federal Indian tax policy that would eliminate jurisdictional questions and reinstate tribal governments' exclusive taxation authority on reservations.

Among other issues, this call for reform pertains to the sometimes-problematic federal tax status of tribes, which this article will touch on briefly.[2] However, until Congress enacts legislation clarifying these issues and preempting state taxation on reservations, intergovernmental tax agreements can provide state and tribal governments with some level of certainty concerning the division of revenue while safeguarding against costly litigation. This, and the fact that agreements can be crafted in mutually beneficial ways that respect tribal sovereignty, make them an effective, if temporary, solution to the ongoing taxation competitions between sovereigns.

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The state of Montana provides a very useful case study that can illuminate issues that arise elsewhere in Indian country, as it has been the setting for several precedent-setting court battles over on-reservation taxation authority, as well as a more recent leader in developing resolutions through detailed state-tribal tax agreements. However, as this article demonstrates, there is still room for innovation. Because so few people understand the role and regulatory rights of tribal governments, let alone the nuances of taxation in Indian country, misinformation abounds, increasing tensions and informing the development of harmful state tax policies and related court rulings that hinder tribal self-sufficiency and exacerbate tax disputes on reservations. To help dispel these mistruths and provide context, this article reviews tribal government responsibilities, sources of revenue, taxation rights, and issues related to the current federal tax status of tribal governments. It also discusses the critical role that the power to tax plays in creating reliable revenue streams that can adequately support government services and operations and encourage desirable behaviors and economic climates through tax incentives and exemptions. Finally, this article reviews the history and outcomes of the state-tribal revenue sharing agreements entered into by the seven reservation governments and the Montana Departments of Revenue and Transportation. I conclude with recommendations for maximizing the usefulness of intergovernmental tax agreements, based partly on lessons learned in Montana. These recommendations can help other tribes and states craft intergovernmental tax agreements that promote tribal self-sufficiency, protect tribal sovereignty, and ensure reservation and statewide socioeconomic health.

Lay of the Land in Montana: Indian Country, Tribal Sovereignty, and the Power to Tax

In the state of Montana, eleven federally recognized tribes and one landless, state-recognized tribe reside on seven Indian reservations. The first reservations were established by treaty in 1855 and predate the creation of the state by thirty-four years.[3] Today, American Indians comprise nearly 7 percent of Montana's one million residents. In 2010, about 40 percent of American Indians resided off-reservation, mostly near the more urban areas of the state, while the other 60 percent lived on one of the reservations.[4] Table 1 below lists each reservation, the tribal groups residing there, and their membership population.

Indigenous tribes in what is now the United States governed themselves from time immemorial.[5] Their sovereignty was inherent and derived from the natural law rights of tribal people to determine their own laws and form of government. Just as European nations interacted diplomatically with tribal nations via treaties, so did the Americans upon their declaration of independence in 1776. The same inherent sovereignty that enabled tribes to enter into treaties is also what enables them to levy taxes within the boundaries of their reservations.

Table 1
Reservations, Tribal Groups, and Tribal Membership Populations in Montana, 2015

Reservation	Official Name of Tribal Government	Tribal Groups	Population
Blackfeet	Blackfeet Nation	Blackfeet	17,321
Crow	Crow Tribe of Indians	Crow	13,269
Flathead	Confederated Salish and Kootenai Tribes	Salish, Kootenai, Pend d'Oreille	7,920
Fort Belknap	Fort Belknap Indian Community	Assiniboine, Gros Ventre	7,000
Fort Peck	Fort Peck Tribes	Assiniboine, Sioux	12,975
landless	Little Shell Tribe of Chippewa Indians	Little Shell Chippewa	5,100
Northern Cheyenne	Northern Cheyenne Tribe	Northern Cheyenne	11,266
Rocky Boy's	Chippewa Cree Tribe	Chippewa, Cree	6,000

Source: Montana Office of Public Instruction, "Essential Understandings Regarding Montana Indians," rev. 2018, 5.

In 1982, the United States Supreme Court held in *Merrion v. Jicarilla Apache Tribe* that the power to tax is

> an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to receive revenues for its essential services. The power does not derive solely from the Tribe's power to exclude non-Indians from tribal lands, but from the Tribe's general authority, as sovereign, to control economic activities within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in such activities.[6]

This power has been greatly diminished over time, largely as a result of the sustained effort of state and local government officials to judicially challenge tribal governments' right to levy taxes and regulate non-Indians residing or doing business on reservations. This is addressed at length after the following overview of the functions of taxation.

Functions of Taxation and Federal, State, Local, and Tribal Government Services and Sources of Revenue

Simply put, tax dollars represent our collective effort to invest in our communities and citizens, funding public services like improvements in roads, bridges, schools, sewer and water systems, providing for public safety, and ensuring that our most vulnerable neighbors are protected. Governments can also use taxation to create beneficial social and economic conditions by taxing risky public health behaviors and providing tax incentives in the form of deductions, exclusions, or exemptions to promote economic development and increase job opportunities.

To understand the complex relationship of tribal governments to taxation, it is helpful to understand the scope of services tribes provide and the functions they perform. For comparison, an overview of the functions, services, and sources of revenue of federal, state, and local governments in Montana is also provided.

Federal, State, and Local Governments in Montana

In very broad terms, the federal government funds services that include health care, education, environmental protection, disaster and emergency relief, federal judicial systems and prisons, national parks, national highway construction and maintenance, airports, postal service, and military defense.[7] The federal government provides some of these services directly and also transfers federal dollars to states to offset a portion of states' costs to provide various services. The federal government's power to tax is articulated in section 8, clause 1 of the United States Constitution. In 2015, 92 percent of the $3.18 trillion in total federal revenue came from taxes. The largest share derived from individual income taxes (47%), followed by payroll taxes (34%), then corporate income taxes (11%). The remainder (8%) was comprised of excise, estate and gift taxes, and customs duties.[8]

State governments commonly provide services that include K–12 and postsecondary education and health care. They build and maintain roads and bridges, provide law enforcement, corrections programs, district courts, natural resource management, and assistance for low-income families.[9] The Montana Constitution articulates the power to levy taxes in article 3. For the 2017 biennium, the largest source of revenue (42%) for Montana was federal revenue, which the state appropriates through the state budget. The second largest source of revenue (37%) was state general fund revenue, which consists of taxes that the state collects. The three largest sources of state general fund revenue in 2017 were individual income taxes (56%), property taxes (12%), and corporate income taxes (6%). Montana also collects certain fees and excise taxes which are earmarked for specific purposes through state special revenue accounts.[10]

Counties, cities, and towns comprise local governments in Montana. Generally, local governments provide law enforcement, public schools, fire protection, and emergency services. They also conduct elections, keep official records, and provide housing, municipal courts, public transportation, parks and recreation services, and public works like sewer and street maintenance, snow removal, and road signage.[11] Local governments rely primarily on transfers from federal and state governments, as well as local property taxes to obtain revenue.[12] In Montana, more than a third (35%) of local government budgets came from transfers from the state in 2013 and a third (34%) came from local taxes; almost all (96%) of this local tax revenue was derived from property taxes. The remaining revenue came from tuition and non-utility charges (17%), federal funds (7%), and interest and miscellaneous revenue (7%).[13]

Tribal Governments in Montana

Tribal governments are fully functioning governments that provide an array of services similar to those of federal, state, and local governments. Many of these services, such

as reservation infrastructure, are provided to the benefit of all reservation residents, including non-Indians. Other services, such as tribal health care and housing, are provided to eligible American Indians from any tribe, while others, like scholarships for education, are provided specifically to tribal members from that particular reservation. In general, tribal government responsibilities include managing tribal land and resources; maintaining tribal roads, bridges and other reservation infrastructure; providing health care, housing, and education; conducting elections and keeping official records; maintaining public order and safety including tribal courts, law enforcement, and public transit systems; and economic and workforce development, among an array of other things. Like other governments, tribal governments have elected officials and employ a sizable workforce in order to perform essential functions and provide services; in fact, tribal governments are oftentimes the largest employers in their geographic areas. Thus, like any government, tribes require revenue to meet their obligations to their members.[14]

While tribal governments operate many of the same public services as other levels of government, they must do so without the usual tax revenue upon which other levels of government rely. As noted earlier, this is partly due to the sustained effort of state and local government officials to judicially challenge tribal governments' right to levy taxes within the exterior boundaries of their reservations, which has greatly limited tribal taxation authority today. As a result, many tribes must rely on their natural resources and tribally owned business enterprises as their only source of revenue outside federal dollars.[15] But even here, states have fought for the ability to co-tax certain economic activities and natural resource development involving non-Indians in Indian country, extracting wealth from oftentimes impoverished communities and creating a system of dual taxation that can confound reservation economic growth, issues which are addressed later in this article.

As noted previously, the power to levy taxes is an inherent right of self-government retained by American Indian tribes. Every federally recognized tribal nation in Montana has articulated this right in their modern-day constitution and many have comprehensive tribal tax codes and tax commissions. Among the few taxes that tribal governments in Montana assess are excise taxes on the on-reservation sale of alcohol, tobacco, and fuel, and severance taxes on natural resource development. However, as a result of revenue-sharing agreements made between the seven reservation tribal governments and the Montana Departments of Revenue and Transportation, revenue derived from these taxes is shared with the state of Montana.[16]

The most recent data shows that in the period from 2003 to 2009, the combined revenue for all eight tribal governments in Montana totaled more than $6.6 billion. The largest source of revenue was federal funds (58%). This includes federal transfers for public schools located on reservations and other education funding, as well as funding for Indian Health Service (IHS), tribal colleges, housing, and Bureau of Indian Affairs (BIA) programs. More than a quarter (26%) of all tribal revenue was earned, while the rest was comprised of transfers from the state of Montana (8%), various sources (6%), and fiduciary (2%).[17]

Although federal transfers to tribes are somewhat similar to both federal transfers to states to fund Medicaid and education and state transfers to counties to support school districts, there is a significant difference: the majority of federal transfers to tribes are a direct result of the federal-tribal trust relationship and treaty agreements. Additionally, many funding transfers are made as part of tribal self-determination contracts and self-governance compacts, whereby the federal government contracts and compacts with tribal governments to administer a variety of programs the federal government is obligated to provide to American Indians. Portions of the transfers also stem from public assistance programs that are available to all other Americans.

Tribal self-determination contracting came about at the behest of tribes and the resulting passage of the Indian Self-Determination and Education Assistance Act of 1975 (Public Law 93-638), which allowed tribes to "step into the shoes of the federal government." However, several major issues arose with federal agency personnel's implementation of the law, including refusal to fully fund tribal indirect costs, establishing unduly burdensome reporting requirements, preventing tribes from adapting programs to meet local needs, and in general interfering with the success of the contracting program.[18] This, in addition to exposed corruption and fiscal mismanagement within the BIA, prompted Congress to amend the Self-Determination Act in 1988, addressing many of the most notable issues and creating the Self-Governance Demonstration Project, which gave a cohort of ten tribes the opportunity to take contracting a step further by allowing tribes the freedom to compact management of one or more programs, redesign the programs to suit local needs, and reallocate funds as they deem necessary.[19]

Due to the success of the demonstration projects, Congress amended the Self-Determination Act in 1994 to establish Tribal Self-Governance as a permanent program within the Department of the Interior (DOI) and within the Department of Health and Human Services (DHHS) in 2000.[20] Today, any tribe that acquires self-governance status can negotiate a management compact and annual funding agreement with the DOI and DHHS for a broad array of programs, including those administered by the BIA and IHS, and a handful of other programs at the discretion of the secretary of the Interior.[21] Tribes receiving federal dollars to carry out self-determination contracts and self-governance compacts are subject to annual audits and trust evaluations to monitor their execution of the federal trust functions they are performing on behalf of the federal government.[22]

As intended, self-determination contracting and self-governance compacting has given tribes greater freedom in determining how best to meet the needs of their local membership populations and helped tribes build their governmental capacities, infrastructure, and local economies.[23] These administrative transfers, however, have also brought new funding challenges. For example, as a result of hiring new personnel to perform the tasks previously performed by federal employees, a tribe's overhead costs can increase. Chronically inadequate federal funding additionally exacerbates this financial burden. Altogether, tribes are regularly required to supplement program budgets with their own resources;[24] thus, as tribes assume more local responsibility, their need for revenue increases as well. Finally, as stated earlier, tribal governments'

ability to build a tax base to support their essential functions and services has been significantly usurped by state and local governments.

Likewise, a handful of related issues regarding the federal tax status of American Indian tribes puts tribes on unequal footing with state and local governments and further compounds their revenue-generating challenges. As an example, tax exemptions and other federal financing tools regularly utilized by federal, state, and local governments have long been out of reach for tribes, as the US Internal Revenue Service (IRS) determined that, lacking the express intent of Congress, tribes did not have the same federal tax status as state and local governments. Even after Congress passed the Indian Tribal Government Tax Status Act in 1982 (followed and amended by the Tax Reform Act of 1984)—clarifying their intent for tribes to enjoy the same tax status as state and local governments in "certain specific areas," including tax-exempt bond financing—several problems remain.[25] For instance, to issue tax-exempt bonds tribes must meet all the same requirements as states, as well as additional requirements applicable only to tribes. This includes the condition that funds can be used only for projects that relate directly to the performance of essential governmental functions, a criterion that states do not have to meet.[26] Further complicating matters for tribes, the 1987 Omnibus Budget Reconciliation Act limited the term "essential governmental function" to exclude functions that are not customarily performed by state and local governments with general taxing powers. Prior to this, tribal essential governmental functions were assumed to include the commercial and industrial activities that many tribal governments regularly undertake in their efforts to generate revenue.[27] In fact, it was tribes' leveraging of tax-exempt bonds to finance tribal enterprises such as these that "raised questions about the application of section 7871(e)" of the Internal Revenue Code of 1986 wherein "essential governmental function" is defined.[28] Consequently, the IRS proceeded to issue a Technical Advice Memorandum (TAM) on the issue in January 2007.

In the TAM, based on the legislative history, the IRS concluded that Congress intended "essential governmental function" to include only noncommercial or industrial activities that numerous state and local governments have been conducting and financing with tax-exempt governmental bonds for many years.[29] Examples include public-works style projects "such as roads, schools, or governmental courthouse buildings which lack a profit-making objective, which focus on public benefit to local citizens, and which do not compete with other businesses."[30] Congress did provide that Indian tribes should be permitted to issue bonds for the construction of tribal manufacturing facilities on tribal trust lands specifically to foster employment opportunities. These facilities, however, could not be built with the intention of earning a profit. Thus, the TAM states that the operation of tribal facilities must lean towards being of "service to the local community" rather than the "attraction of paying customers from outside the local community."[31]

Further, although in most instances tribes are treated like state and local governments in regard to federal excise tax exemptions, there is a major stipulation. In order to meet the exemption criteria, tribal governments must be engaged in the performance of an "essential governmental function," while state and local governments are

not held to the same standard.[32] Hence, if a tribe purchases an item specifically to resell to consumers for a profit as part of a tribally owned business enterprise that generates revenue that supports the tribal government, for example, the purchase is not considered to directly serve an essential governmental function and therefore does not qualify for federal excise tax exemption.[33]

The essential governmental function test has also created additional complications, inconveniences, and costs for tribal governments when acting as employers. As employers, tribal governments are required to pay into either the Federal Unemployment Tax Act (FUTA) taxes or the State Unemployment Tax Act (SUTA) taxes on behalf of their employees.[34] Tribal governments must also withhold from their employees' gross wages federal income, social security, and Medicare taxes, also called Federal Insurance Contribution Act (FICA) taxes. Under FICA, tribes must match their employees' social security and Medicare contributions.[35] Unlike state and local governments, tribal governments may be required to pay the same FICA taxes as employers in the private sector because the Pension Protection Act of 2006 established that tribal government retirement plans did not qualify as "government" plans unless 100 percent of tribal employees are engaged in essential governmental functions.[36] Since numerous tribes rely heavily on their natural resources and tribal business ventures to produce government revenue, they tend to have employees engaged in seemingly commercial activities. As a result, retirement plans for those employees are governed by the same laws and IRS codes as employer-sponsored plans in the private sector.[37] Thus, tribal governments may be forced to administer two separate employee retirement plans—one for workers performing essential governmental functions and another for those performing commercial activities, resulting in increased costs for the tribe.

IRS section 457 provides an exception allowing certain state and local governments and nonprofit employers to create deferred compensation plans for their employees engaged in commercial activities. Tribal governments, however, are not recognized as eligible governments and therefore cannot sponsor a 457 governmental plan.[38] In the end, many tribes elect to offer their employees 401(k) retirement savings plans, which often yield less than traditional pension plans, partly because management and investment fees are higher, and partly because professional managers of pooled pension funds tend to get higher returns than employees who manage their own 401(k) plans.[39] These limitations can put tribes at a disadvantage when it comes to attracting and keeping qualified employees, to whom a job with good benefits and a secure retirement income is important.

Clearly, when it comes to their legal tax status, tribes face an array of difficulties and restraints not experienced by other levels of government, which can hinder tribes' ability to promote economic development and achieve self-sufficiency. To add to these challenges, tribes' ability to generate revenue through on-reservation taxation has been fraught with legal challenges from state and local governments, resulting in significant losses of tribal taxation authority on reservations.

Taxation Authority on Indian Reservations

While tribal governments once held exclusive taxation authority on their reservations, including over non-Indians, the absence of comprehensive federal Indian tax policy has opened the door for state and local governments to repeatedly challenge this. As a result, over the past few decades, tribal taxation authority over non-Indians on reservations has been heavily contested and significantly limited by a series of US Supreme Court rulings. When litigated, the resolution of these disputes generally depends upon the specific details of each case and the weighing of federal and tribal interests against those of the state and/or county according to a complex and sometimes seemingly contradictory set of "tests" developed by the US Supreme Court. Thus, it is important to note that in the absence of clarifying congressional legislation, this area of tribal law is fluid and dynamic and very much affected by the evolving makeup of the US Supreme Court and state and tribal leadership. With this in mind, I provide an overview of current tribal, state, and local taxation authority in Indian country.

Tribal Taxation Authority over Tribal Members and Non-Indians on Reservations

Due to their sovereign status, tribal governments can unilaterally impose taxes on their own members residing on their reservation. However, there are very few tribes that tax their member populations.[40] In 1981, in *Montana v. United States,* an important case involving the Crow Tribe and the state of Montana, the court formalized the extent of tribal authority over non-Indians on reservations across America. These resulting "Montana exceptions," when applied to taxation, provide that tribes can impose taxes on non-Indians via commercial transactions that occur on reservation trust land. They can also impose taxes on non-Indians via commercial transactions occurring on reservation fee land when: (1) the non-Indian individual or entity being taxed has entered into a consensual contractual agreement with a tribe or tribal member; or (2) the activity being taxed threatens or has some direct effect on the political integrity, economic security, or health or welfare of the tribe.[41]

State Taxation Authority over Tribal Members and Non-Indians on Reservations

States cannot tax tribes or tribal members or their commercial transactions on trust land on their own reservations.[42] Although political status, or tribal membership, matters, so does land status, as states and counties can now tax on-reservation fee land even when it is owned by a tribe or tribal member. Likewise, with the exception of income derived directly from allotted trust lands or treaty fishing rights, states may tax the income of tribal members living on-reservation whenever the income is derived from off-reservation sources.[43] States can levy certain taxes on non-Indians in Indian country whenever: (1) federal law does not explicitly prohibit the tax; and (2) the tax does not interfere with the tribe's ability to perform its governmental functions.[44]

Concurrent State-Tribal Taxation Authority on Reservations

Adding to the complexity of jurisdictional questions, the United States Supreme Court has found that in certain circumstances both tribal and state governments have the right to tax the same activity.[45] This has resulted in numerous complications, including dual state and tribal taxation of the same on-reservation commercial activities and is one of the primary sources of modern-day revenue feuds among tribes, states, and local governments.

State and Tribal Revenue Competitions in Montana

Over the past several decades, many state and local governments have made concerted efforts to increase their regulatory and taxation authority on reservations, and Montana has been among the states historically most active in this effort. In fact, one of the first United States Supreme Court Indian tax cases that had wide-reaching impacts concerned the state of Montana and the Confederated Salish and Kootenai Tribes (CSKT).

In 1975, Montana law enforcement officials arrested a business owner and member of the CSKT for selling untaxed cigarettes to non-Indians and for failing to possess a state cigarette retailer's license, both of which were misdemeanors under Montana law. The business was located on trust land on the Flathead Reservation. The owner and the tribal government sued the state in federal district court, which found that the state was barred from imposing its tax on reservation sales of cigarettes by tribal members to other tribal members residing on the reservation, as well as from imposing its vendor license fee on tribal-member businesses on the reservation. However, the court found that the state had the right to impose its cigarette tax on purchases made by non-Indians on reservations. The state appealed and the United States Supreme Court upheld the federal district court's ruling, adding that requiring a tribal retailer to collect a state tax owed by non-Indians was a "minimal burden designed to avoid the likelihood that, in its absence, non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax."[46]

Thus, it was established that state taxation authority over non-Indians on reservations included transactions occurring on trust land and that states could require tribal business owners to collect and remit these taxes to the state. The issue of simultaneous impositions of tribal and states excise taxes came before the US Supreme Court shortly after *Moe*. In 1980, in *Washington v. Confederated Tribes of the Colville Indian Reservation,* the US Supreme Court affirmed tribes' right to impose tribal excise taxes on non-Indian commercial transactions on reservation trust land—but not to the exclusion of states, which the court held had a concurrent right to impose their own taxes.[47] In these instances, non-Indian consumers are subject to both the tribal and state tax, resulting in dual taxation of the same item or activity. This results in higher costs and serves to penalize non-Indians for doing business with tribes and tribal member businesses on reservations. Likewise, dual taxation can also frustrate tribes' ability to attract businesses to their reservations by offering tribal tax exemptions. This is because even with the tribal tax immunity, the overall tax does not fall below

the existing state tax, thus offering no additional incentive to doing business with the tribe.[48] These impacts can reduce much-needed commercial activity on reservations and limit tribes' ability to develop a tax base to sustain reservation infrastructures, economies, and essential tribal government functions and services, which increases tribes' reliance on federal dollars.

As with excise taxes, both state and tribal governments have competed for severance tax revenue and the ability to tax non-Indians engaged in natural resource development on reservations. This ability to co-tax non-Indian producers led to another United States Supreme Court case concerning the state of Montana, this time over a dispute with the Blackfeet Tribe. In 1932, the Blackfeet Tribe began oil and gas leasing on their reservation under an 1891 act that was amended in 1924 to allow state taxation of leases. In 1938, Congress passed the Indian Mineral Leasing Act (IMLA) to obtain uniformity in mineral leasing on reservations. This act neither specifically repealed nor authorized state taxation; however, it contained a clause repealing all or part of any prior act inconsistent with the 1938 act. By 1978, the Blackfeet Tribe had active leases with non-Indian entities for the production of oil and gas on 125 parcels of unallotted reservation trust land. Twelve leases were made under the authority of the 1981 act and the rest were made after the 1938 IMLA. Two Montana counties overlapping the reservation imposed four distinct state oil and gas taxes on the lessees without distinguishing between the royalties collected pursuant to the 1981 act and those collected under the 1938 act. Upon their assessment by the state, the companies paid the state taxes and deducted the amount from their royalty payments to the tribe. Despite an opinion from the solicitor of the Department of the Interior that the state could not tax tribal proceeds from leases made after the 1938 act, the state continued to do so. In 1978, the Blackfeet Tribe filed suit in federal district court, which in 1981 entered a summary judgment in favor of the state.[49] The tribe appealed to the Ninth Circuit, where initially a panel affirmed the federal district court's decision. Subsequently, however, the Ninth Circuit reversed in part and remanded the case to the district court for further proceedings to determine the legal incidence of the state taxes and whether they were preempted by the standards the Ninth Circuit articulated in *Crow Tribe of Indians v. Montana* (addressed in the next paragraph).[50] The state sought US Supreme Court review of this decision, which then affirmed the Ninth Circuit's 1985 finding that the state of Montana could not tax the Blackfeet Tribe's royalty interests under oil and gas leases issued to non-Indian lessees.[51]

In 1989, only four years later, in *Montana v. Crow Tribe of Indians* the US Supreme Court affirmed the finding of the Ninth Circuit in the revenue competition between the state of Montana and the Crow Tribe, which had started in the 1970s. This case also concerned the imposition of state severance taxes, as well as gross proceeds taxes, which the state enacted in 1975 and began imposing on all coal produced in Montana. The state levied these taxes against a non-Indian company already working under an existing contract with the Crow Tribe to mine coal beneath reservation land, as well as beneath a strip of land previously part of the reservation which the tribe ceded to the United States in 1904. Importantly, the tribe retained mineral rights to this ceded strip. Shortly after the state enacted its severance and gross proceeds taxes, the Crow

Tribe enacted the Crow Tribal Coal Taxation Code, which included a tribal severance tax. The secretary of the Interior approved the tribe's code, but only as it applied to the current reservation and not the ceded strip. By 1979, the non-Indian mining company under contract for mining Crow coal had paid the state nearly $20 million in severance and gross proceeds taxes, while its royalty payments to the tribe totaled less than $6 million.

In 1978, the Crow Tribe sued the state in federal district court on the grounds that the state's high severance tax rate worked to control the rate of tribal coal production, and, by making the cost of production financially unfeasible for producers, also prevented the tribe from imposing their own severance tax, both of which interfered with the tribe's self-governing abilities. Moreover, the economic burden of the state tax was passed to the tribe in the form of decreased royalty payments. Finally, the tribe maintained that the state's gross proceeds tax was preempted by the IMLA.

In 1981, after the court dismissed the tribe's complaint, the tribe appealed to the Ninth Circuit, which reversed and remanded the case back to the district level for further proceedings based on the fact that Montana's severance tax rate of 30 percent of the value of the coal was "more than a revenue-raising device. It has regulatory purposes as well." However, "this coal is not the state's to regulate, and assertion of such authority diminishes the tribe's own power to regulate."[52] The court further found that "any substantial incursion into the revenues obtained from the sale of Indians' land-based wealth cut to the heart of the Tribe's ability to sustain itself."[53]

After a trial concerning the tribe's amended claim, the federal district court found that Montana could tax the Crow Tribe's coal beneath the ceded strip (a decision which the Ninth Circuit reversed in 1988). Following the district court ruling in 1982, however, the Crow Tribe entered into an amended lease agreement with the mining company that allowed the tribe to have a tax in place that would enable them to claim related tax revenue from that time forward. Likewise, the agreement allowed the company to avoid dual taxation and free it from any tax liability to the tribe for the years 1976–1982. In 1983, pending resolution of the controversy over Montana's taxing authority, the federal district court granted a motion by the tribe and the company to deposit severance tax payments into the court's registry. In 1988, after the Ninth Circuit overturned the federal district court's ruling, the $23 million in tax revenue held in the court's registry was paid out to the Crow Tribe. The tribe also attempted to recover the $57 million the state had unlawfully collected between 1975 and 1982, all of which the Ninth Circuit held the tribe was entitled to recover. In 1998, however, the US Supreme Court found otherwise, noting that because the tribe and state shared taxation authority, the tribe's request for full recovery was thus inequitable and the tribe would have to seek further relief in district court, which the tribe did.[54]

As these cases were playing out, the state of Montana and its counties continued to aggressively assert their taxation and regulatory authority on reservations, which inevitably provoked additional legal confrontations with tribes and tribal members. In 1989, the state and one of its counties began imposing property taxes on reservation land held in fee status by members of the Crow Tribe, triggering a class-action

lawsuit. A state district court found that the state and county could not tax the land in question because the Crow Reservation was not allotted under the terms of the General Allotment Act of 1887, which act was found to provide the congressional consent needed for state and county taxation of reservation fee land.[55] This right of states and counties to tax reservation fee land was affirmed in the 1992 US Supreme Court case, *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*.[56] As a result, Montana tribes cannot assess property taxes on reservation fee land. Further, because Montana has opted to exercise this ability, tribal governments and individual tribal members can be subject to state and county property tax assessments on fee land they own, even when it is located within the exterior boundaries of their own reservation. For reservations such as Fort Peck, where fee land comprises more than half the reservation, this inability equates to a sizable loss of potential revenue for tribes, as seen in table 2 below.

Table 2
Reservation Land Status in Montana

Reservation	Tribe	Trust land (%)	Fee land (%)
Blackfeet	Blackfeet Nation	63	36
Flathead	Confederated Salish and Kootenai Tribes	56	32
Crow	Crow Tribe of Indians	68	32
Fort Belknap	Fort Belknap I ndian Community	97	0
Fort Peck	Fort Peck Tribes	46	54
Northern Cheyenne	Northern Cheyenne	99	1
Rocky Boy's	Chippewa Cree Tribe	100	0

Source: Montana Legislative Services Division and Margery Hunter Brown Indian Law Clinic, "Tribal Nations in Montana: A Handbook for Legislators," October 2016, 24

The inability of tribes to levy property taxes on reservation fee lands has added to the attractiveness of taxing economic activities entered into by non-Indians on reservations. As part of their economic development efforts, many tribes own businesses including hotels and resorts. Apart from income generated by the business, assessing hotel occupancy taxes also brings in revenue—and with it, legal challenges from states. In 2001, in *Atkinson Trading Co. v. Shirley*, the Tenth Circuit Court of Appeals held that tribes have the exclusive authority to impose hotel occupancy taxes on all patrons, including non-Indians, who stay at tribally and privately owned hotels located on tribal trust land within their reservation boundaries.[57] In 2002 a Montana state district court ruling upheld this exclusive tribal hotel taxing authority when the Montana Department of Revenue sued the CSKT for failing to collect and remit the state bed tax from non-Indian patrons staying at the tribal *KwaTaqNuk* resort. Montana had enacted its tax in 1987, after which the CSKT collected the tax and

deposited it in escrow. In 1997, the state and CSKT reached a settlement wherein the CSKT agreed to pay the state $245,000. After that, the CSKT refused to collect and remit the state's tax, prompting the state to direct state employees to boycott the resort while on government business. The district court ruled that the state lacked authority to impose its lodging tax in tribal hotels, even when the tax falls on non-Indians. After the district court's ruling, the state appealed; however, a Montana Supreme Court finding around the same time compelled them to drop their appeal.[58]

In *Flat Center Farms, Inc. v. State of Montana Department of Revenue*, an Indian-owned business operating exclusively on trust land on the Fort Peck Reservation appealed the imposition of the state corporate license tax to the State Tax Appeal Board. The board upheld the tax, prompting the business owner to appeal to a state district court, which reversed the tax board's decision. The Department of Revenue then appealed to the Montana Supreme Court, which upheld the district court's decision that the state cannot tax Indian-owned businesses operating on reservation trust land, regardless of whether they are organized as corporations under state law.[59]

It was within this context of increased tensions and decades of state embroilment in costly legal battles with numerous tribal governments that Montana's intergovernmental tax agreements came about.

State-Tribal Revenue-Sharing Agreements in Montana: History and Outcomes

Montana's intergovernmental tax agreements are rooted in the 1976 decision in *Moe v. Confederated Salish and Kootenai Tribes*, which affirmed the right of states to require tribal businesses, including those operating on trust land, to collect and remit state excise taxes validly imposed on non-Indians. After *Moe*, the state of Montana began seeking ways to legally enforce the collection of its tobacco tax from non-Indians purchasing tobacco on reservations. In 1989, the Montana legislature introduced Senate Bill 440, which would have required wholesalers to pre-collect the state tax on all tobacco going to retailers on reservations, after which they could apply for a refund from the state for all cigarettes sold to tribal members by Indian retailers. This bill was crafted without tribal consultation and died in committee.[60]

During the next legislative session in 1991, the US Supreme Court found in *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma* that tribal sovereign immunity protects tribes from lawsuits by state and local governments for the collection of state sales taxes. However, they also offered several suggestions for how states and tribes could resolve this issue, including entering into negotiated agreements for the collection of these taxes.[61] The Montana legislature took this to heart and began working towards this the same year. Introduced during the 1991 session, House Bill (HB) 1012 required the Department of Revenue to negotiate with each tribal government to determine suitable methods of collecting the tobacco tax, as well as the possibility of resolving other taxation issues through state-tribal cooperative agreements. The legislature modified HB 1012 to exclude the development of a tax collection plan—which sentiment found its way into House Joint Resolution

(HJR) 53, but retained its explicit language regarding state-tribal tax agreements.[62] HJR 53 required the Revenue Oversight Committee to study "all aspects of federal, state, local, and tribal taxation on reservations, including but not limited to income, property, natural resource, selective sales, excise, and other taxes."[63] Together with the Revenue Oversight Committee, the Indian Affairs Committee recommended legislation to amend the State-Tribal Cooperative Agreements Act of 1981 to specifically include tax assessment and collection and to revise the state tax code to provide for the distribution of revenue collected through state-tribal cooperative agreements.[64]

Following the passage of HB 1012, the Department of Revenue began its first negotiations with the Fort Peck Tribes concerning oil and gas severance taxes and tobacco, fuel, and alcohol excise taxes. Shortly thereafter, the department also entered into negotiations with the Blackfeet, CSKT, Fort Belknap, and Northern Cheyenne tribes. By 1992, only the negotiations with the Fort Peck Tribes had resulted in revenue-sharing agreements.[65] The 1993 Montana legislature followed through by approving the recommendations developed by HJR 53, and state-tribal revenue sharing agreements became a tool for reducing legal conflicts and easing tensions between tribes and the state.

Today, the state of Montana and the seven reservation tribal governments have negotiated eleven revenue-sharing agreements for a variety of taxes on the on-reservation sale of alcohol, tobacco, and fuel, and, in one instance, oil and natural gas production.[66] Not every tribal government in the state has entered into an agreement for each of these taxes. For example, the Crow Tribe and Northern Cheyenne Tribe have instituted a ban on the sale of alcohol on their reservations, and thus they have not entered into a revenue-sharing agreement with the state for alcohol. Additionally, most tribes in the state are not engaged in natural resource development and thus have not entered into revenue-sharing agreements with the state for severance or other taxes on coal, oil, or natural gas production. Although each revenue-sharing agreement is independent, they are all similar. In accordance with Montana statute, each states that its general purpose is to avoid legal controversy, possible litigation, and dual taxation. The agreements also contain sections detailing applicable state and tribal tax laws, the collection and administration of the tax, and duration and termination of the agreement. Although a couple do not, most of the agreements automatically renew if the parties do not meet prior to the expiration date. Many of the agreements also include mutual limited waivers of state and tribal or only tribal sovereign immunity. Many but not all agreements also contain a stipulation that venue and jurisdiction for enforcement of terms will be the federal district court, or if that court lacks jurisdiction, a Montana State District Court.[67]

Per the agreements, all reservation residents—Indians and non-Indians alike—pay excise taxes on alcohol, tobacco, and fuel that they purchase on the reservation. The single exception is members of the CSKT, who, as a result of *Moe*, do not pay taxes on cigarettes they purchase on their own reservation.[68] Because of this, the CSKT do not receive a remittance share of this particular tax from the state; instead, they receive a limited number of tax-free cigarettes according to quotas set by Montana law. Any sales above the quota, however, are taxed.[69]

In Montana, excise taxes on alcohol and tobacco are imposed at the distributor level and included in the sale price of the item. Generally, the state pre-collects all taxes on alcohol, tobacco, and fuel sold on the reservations and then remits a portion of each tax to the tribal governments on a quarterly basis. The portion of taxes on liquor, beer, wine, and hard cider that tribes receive is an approximation of the on-reservation sales to enrolled tribal members. Alcohol tax refunds to tribes are determined by multiplying the state general fund portion of tax receipts statewide by the number of enrolled tribal members living on the reservation.[70]

As with alcohol taxes, the portion of taxes on cigarettes and tobacco products tribes receive is an approximation of sales to enrolled tribal members. Tobacco tax refunds to tribes are calculated by multiplying 150 percent of the Montana per-capita tobacco tax collected by the total number of enrolled tribal members living on the reservation.[71]

Fuel tax refunds to tribes represent a portion of the gasoline license tax collected on-reservation, and are again, approximations of sales to enrolled tribal members living on the reservation. Fuel tax refunds to tribes are based on the statewide per capita gasoline license tax receipts multiplied by the number of enrolled tribal members residing on the reservation, minus a 1 percent administration fee retained by the state. The per-capita gasoline license tax is based on the prior fiscal year's gross total of gasoline license taxes collected by the state, adjusted by any refunds, credits, corrections, audits, minus any statutory and legislative allocations (such as the 16 percent set aside to local governments).[72]

On-reservation tribal population counts are determined—and, in many cases, verified by affidavit—in a number of ways. Most agreements rely on the tribe's official enrollment office records; however, some require additional records, such as proof of address for individual tribal members, or the tribe's most recent voting list for tribal elections.[73]

The solitary oil and gas revenue-sharing agreement active in 2016 was between the Fort Peck Tribes and the state. It concerns only new oil and natural gas production and expired on June 30, 2017. This breakdown of revenue was determined differently than in the other revenue-sharing agreements. Here, it was divided equally between the tribe and state based on the stated reason that both the Fort Peck Tribes and the state share equal taxation authority over the on-reservation oil and natural gas production by non-tribal members.[74]

Because most tribal shares are approximations of on-reservation sales to tribal members and not based on actual transactions, it is unfeasible to determine whether certain tribes experience a revenue loss or gain in the share they receive from the state compared to actual sales. What is known are the total revenue amounts to each government. In 2016, total revenue to the state of Montana from tobacco and alcohol tax was $104.9 million, while the total combined tribal government share was $5.7 million.[75] Total revenue to the state from gross motor fuel taxes was $232 million and the total combined tribal share was $5.1 million.[76] Neither the state of Montana nor the Fort Peck Tribes derived any revenue from new oil and natural gas production on Fort Peck in 2016; however, total revenue to the state from oil and natural gas production taxes was $84.9 million that fiscal year.[77] Table 3 below depicts the breakdown

Table 3
Total Alcohol, Tobacco, Fuel, Oil, and Natural Gas Tax Revenue to the State and Tribal Governments in Montana (US Dollars), Fiscal Year 2016

Government	Alcohol	Tobacco	Fuel	Oil and Gas
State of Montana	23,609,450	81,332,431	232,092,463	84,972,199
Blackfeet Nation	237,335	1,198,687	1,089,624	(no agreement)
Chippewa Cree Tribe	(no agreement)	510,528	464,439	(no agreement)
Confederated Salish and Kootenai Tribes	133,089	(Quota MCA*)	611,146	(no agreement)
Crow Tribe of Indians	(no agreement)	1,218,269	1,112,213	(no agreement)
Fort Belknap Indian Community	113,330	572,384	530,421	(no agreement)
Fort Peck Tribes	173,669	895,971	814,632	0**
Northern Cheyenne Tribe	(no agreement)	510,528	464,439	(no agreement)

Sources: Data from Montana Governor's Office of Indian Affairs, "Partners in Building a Stronger Montana: 2016 State-Tribal Relations Report," September 2016, 27; Montana Department of Revenue "Biennial Report: July 1, 2014–June 30, 2016," December 13, 2016, 134, 151, 252–254; Montana Department of Transportation "2016 Fact Book," 11, 20.
* Instead of tax revenue, the Confederated Salish and Kootenai Tribes receive tax-free cigarettes pursuant to quotas set by statutes. (See Montana Code Annotated 16-11-144.)
** The terms of the agreement ran from March 25, 2008 until June 2017 and concerned only new oil and gas production. (See "Fort Peck Tribe and State of Montana Oil and Natural Gas Production Tax Agreement.")

of Montana and tribal government alcohol, tobacco, fuel, and oil and natural gas tax revenue in 2016.

These agreements have enabled the tribes and the state to avoid dual taxation while maintaining shared taxation authority over certain commercial transactions and activities on reservations, as well as to derive a share of revenue from taxes that have long been a source of complicated and lengthy legal feuds prior to them. In addition, these agreements have solidified the government-to-government relationship between tribes and the state and have significantly reduced tensions between governments; in fact, since the advent of the agreements there has been no litigation between tribes and the state concerning the areas of taxation covered in the agreements.[78]

They have also opened the door for other intergovernmental tax agreements between tribes and the state. For example, after the forty years of litigation concerning Montana's taxation of Crow coal mined from beneath the ceded strip and the proper division of past revenue unlawfully collected by the state, the two sides came together in a way that illustrates the range of possibilities for crafting intergovernmental tax agreements. Part of the agreement entailed that the tribe relinquish its pending appeals claim to past tax revenue in exchange for $15 million from the state that was related to the Crow Water Rights Compact. The agreement also specifies that the tribe will repeal its severance tax on tribal coal mined from beneath the ceded strip, enabling the state to impose its tax. In exchange, the state agreed to remit to the tribe the severance and gross proceeds tax revenue it collects on the tribe's coal.[79]

While these intergovernmental tax agreements have helped stop the proliferation of legal battles between tribes and the state of Montana, another important piece of improving state-tribal relations has been a commitment on the part of the state to reinvest tax dollars collected from reservations back into reservation communities. To its credit, among several programs funded in part through federal dollars or grants, Montana invests state general fund dollars directly into specific Indian country programs. Tribal language preservation, support for tribal colleges, and an array of reservation economic development programs alone amounted to $5.1 million for the 2015–2016 biennium.[80] Such investments demonstrate that the state acknowledges it has a vested interest in the well-being of the citizens and economies that it shares with the tribes located within its boundaries.

Although positive outcomes have been achieved in Montana in recent years, there is still room for innovation. For example, if a tribe is actively working to create or implement a long-range economic development plan or valuable social program, states, including Montana, should consider employing flexibility in determining revenue-sharing agreement terms, including the methods used to calculate state and tribal shares. The state may agree to accept a smaller share of tax revenue during a critical phase, or agree to reinvest its share into the project for a specified period of time. Further, states can explore new areas of on-reservation taxation where state and local governments currently enjoy tax primacy. One example is property taxation of on-reservation fee land; another is to exempt from state taxation income earned by Indians working on reservations where they are not enrolled. State legislatures can also enact laws giving primacy to an array of tribal taxes, such as reservation sales and use taxes, or tribal utility or severance taxes, thus allowing the tribal tax to preempt the state tax. Extracting wealth from reservation communities that oftentimes are already impoverished results in some of the most harmful outcomes to reservation economies and tribal self-governance; alterations such as these can reduce those harms.

As the history of controversy and compromise in Montana attests, intergovernmental tax agreements can provide state and tribal governments with some level of certainty regarding the division of revenue while safeguarding against drawn out and expensive litigation. This, and the fact that agreements can be crafted in mutually beneficial ways that respect tribal sovereignty, make them an effective, if temporary, solution to the ongoing taxation competitions between sovereigns.

Conclusion

Although there are federal-level tax issues for tribes that can only be resolved by Congress, there are ways that tribes and states can find clarification on taxation issues that involve neither Congress nor the courts. In Montana, negotiating intergovernmental tax agreements has successfully eliminated the threat of dual taxation and costly litigation while providing state and tribal governments with a degree of certainty regarding the division of revenue.

However, every assertion of state and local taxes in Indian country results in a corresponding decrease in a tribe's potential tax base, not to mention an encroachment

on tribes' once-exclusive taxation authority on their own reservations. But this is not to say that tribes have nothing to gain from entering into intergovernmental tax agreements with states, particularly given the current state of federal Indian tax policy and federal court rulings. In practice, entering into intergovernmental agreements with states is an exercise of tribal sovereignty; thus, these agreements are a way of attaching "practical meaning to the abstract legal concept of sovereignty."[81] They also enable tribes to achieve certainty on intergovernmental tax issues and protect current tribal taxation authority by preempting additional legal challenges.[82] In terms of benefits to states, revenue-sharing agreements enable the assertion and collection of state taxes in Indian country that might otherwise prove difficult due to unresolved legal questions and/or tribal sovereign immunity.

Achieving additional and more meaningful outcomes that demonstrate greater support for tribal governments and sovereignty requires that state and tribal governments understand the short- and long-term implications of the dangers that extracting wealth from Indian country poses to the delivery of tribal government services and functions, and to the economic health of reservations and the state as a whole. Likewise, states can decrease some of the most harmful effects to reservation economies and tribal sovereignty by employing flexibility in determining revenue-sharing agreement terms, including the methods used to calculate state and tribal shares and committing to reinvesting revenue back into reservation communities in amounts at least equal to what has been withdrawn. Ultimately, however, before embarking on aggressive and ill-informed efforts to challenge and displace tribal regulatory and taxation authority at every turn, states should carefully consider the spectrum of negative impacts that can result from extracting wealth from their most impoverished communities. They would do well to remember that what is good for Indian country, is good for the state as a whole.

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